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Supreme Court, U. S.
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No. A-992

In The

Supreme Court of the United States

October Term, 1980

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ROBERT E. WILLIAMS,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

—o—

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

—o—

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QUESTIONS PRESENTED

1. Did the trial court and Nebraska Supreme Court's decisions regarding certain police reports requested by the defense result in a situation which denied the defendant any rights he might have under the Fifth, Sixth, or Fourteenth Amendment of the United States Constitution?

2. Did the trial court and Nebraska Supreme Court's decisions regarding certain photographs that were introduced as evidence by the prosecution deny the defendant any right he might have under the Fifth, Sixth, or Fourteenth amendment to the United States Constitution?

3. Did the trial court's refusal to give petitioner's requested instructions concerning: (1) the potential consequences of a verdict of "not guilty by reason of insanity;" and (2) "intoxication" deny any right the defendant might have under the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution?

4. Are the Nebraska statutes with regard to the death penalty and subsequent review thereof constitutionally valid? Did the statutes as they are written or as they were applied deny the defendant any right he might have under the Fifth, Sixth, Eighth, or Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

Pages

Questions Presented i

Jurisdiction 1

Statement of the Facts 3

Reasons to Deny Certiorari:

I. The decisions of the trial court and Nebraska Supreme Court regarding police reports requested by the defense, did not violate any right to which the defendant was entitled. 9

II. The decisions made by the trial court and the Nebraska Supreme Court regarding admission of evidence did not infringe on any rights of the defendant. 12

III. 17

IV. 20

Conclusion 27

Appendix A ..... App. 1

Appendix B ..... App. 2

CASES CITED

Lisenba v. Califorina, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280, *reh'g denied,* 315 U. S. 826, 186 L. Ed. 1222, 62 S. Ct. 620 (1941) 13

Moore v. Illinois, 408 U. S. 786, 337 L. Ed. 2d 706, 92 S. Ct. 2562, *reh'g denied,* 409 U. S. 897, 34 L. Ed. 2d 155, 93 S. Ct. 87 (1972) 11

CASES CITED—Continued

Pages

Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860 (1937) 20

Splawn v. California, 431 U. S. 595, 52 L. Ed. 2d 606, 97 S. Ct. 1987 (1977) 18

State v. Casados, 201 Neb. 726, 271 N. W. 2d 849 (1978) 16, 17

State v. Williams, 205 Neb. 56, 287 N. W. 2d 18 (1979) ... 10

United States v. Agurs, 427 U. S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976) 11

STATUTE CITED

Section 27-404 (2), R. R. S. 1943 ..... 16, 17

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JURISDICTION

The petitioner raises four main issues in his "questions presented" section. These issues clearly fail to meet the jurisdictional requirements of Supreme Court Rule 17(1) (b), (c).

In his first three issues the petitioner claims, for a variety of reasons, that he was denied "equal protection and due process of the law." Initially it should be noted that, with regard to his first three issues, petitioner fails to raise anything that even remotely resembles an equal protection argument.

The due process argument also fails to meet the jurisdictional requirements. As this petition for denial will make clear, the issues the petitioner raises were: properly decided; on adequate state grounds; which are in full conformity with the past decisions of this honorable court. There can be no doubt that the multiple hearings that the petitioner received at the state level, fully accorded him all process to which he was due.

In his first three issues petitioner fails to present " . . . special and important reasons . . . " to justify certiorari by this court. Thus, it is submitted that the petitioner fails to establish appropriate jurisdiction for review.

The foregoing arguments are also true of the petitioner's fourth issue and all its subdivisions. Furthermore, many of the subissues in the fourth questions are blatantly inappropriate for review inasmuch as they were not timely raised in the court actions below.

Denial of certiorari is independently justified due to petitioner's failure to comply with Rule 21 (5).

As will be demonstrated throughout this reply, petitioner's representation of this case is anything but: accurate, brief, and clear. The argument section of the petition for certiorari contains several factual errors and either omits or misconstrues other facts—thus resulting in a very deceiving picture of the case at hand. Beyond this, the petitioner fails to provide any accuracy with regard to the basis for the judicial decision in the courts below. Examples of these problems will be continually shown in this reply.

The overall effect of the petition for certiorari is both inaccurate and unclear. This, it is suggested, should

provide for a denial of certiorari under the Supreme Court Rule 21(5).

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STATEMENT OF THE FACTS

On August 11, 1977, five year old Lori Brooks was found wandering around her neighborhood looking for her mother, Katherine Brooks. A neighbor, in an attempt to assist Lori, called the home of Mr. and Mrs. Robert Rada, Lori's grandparents. When the grandparents were unsuccessful in locating their daughter, they called the police department and county attorney for assistance. The grandparents feared that something was wrong because they knew their daughter would not leave Lori unattended.

In response to the Rada's call, the Lincoln Police dispatched two officers to Katherine Brooks' residence to assist in the search for her. They too, examined her residence.

In checking the neighborhood, the police found that Patty McGarry had also not been recently seen. Mrs. Gruenemeier, a neighbor, had a key to the McGarry apartment and suggested that it too should be checked. In the company of Mrs. Gruenemeier, Detectives Bruckner and Hossman went to the doorstep of Patty McGarry's apartment. Mrs. Gruenemeier opened the door, then turned and ran off across the yard screaming. The police officers proceeded cautiously inside.

Hearing a sound upstairs, Detective Hossman rushed up the staircase and came down carrying Mac McGarry, Patty McGarry's four year old son. Detective Hossman covered Mac's eyes so that he could not see the scene being observed by Detective Bruckner.

The scene Detective Bruckner saw was the body of Katherine Brooks lying facedown in the center of the living room. She was naked. A pool of blood surrounded her head.

The officers also found the body of Patty McGarry in the dining room lying face up, dead. A closer examination of her corpse revealed three gunshot wounds—one in her right jaw and two in her neck on the left.

It appeared that Patty McGarry had been shot in the living room, left the room, leaving a trail of blood into the dining room where her body was found. Apparently she fell in the dining room wounded and bleeding, but not dead from the initial gunshot wound.

Among other things found by the police in the McGarry apartment were: a beer bottle which later proved to have defendant Robert Williams' fingerprints, a full box of bullets for a .22-caliber gun, and a shellcasing of a fired .22-caliber bullet. A bullethole was also noticed in the wall that divided the living room from the dining room.

The autopsy of Katherine Brooks revealed, among other things, that there was a considerable quantity of spermatozoa in her vaginal vault, and in her rectal tract. At trial Dr. Papenfuss testified that spermatozoa in the rectal tract would have to have been deposited within an hour of Katherine Brooks' death.

An investigation was commenced by the Lincoln Police Department. That investigation revealed, inter alia, that the defendant had purchased a model K-22 Smith and Wesson revolver and five boxes of 22 long rifle bullets at Montgomery Wards in the Gateway Shopping Center in Lincoln, Nebraska. The purchase was made at approximately 7:15 p. m. on August 10, 1977.

At approximately 9:30 a. m. on August 11, 1977, the defendant appeared at the apartment of another young woman, Janice Lamborn. The defendant gained entrance into Ms. Lamborn's apartment by asking if he could come in and use her phone explaining that his car had broken down. She testified at trial that at the time she felt apprehensive about having him there. Accordingly, she suggested that he stay in the storeroom area of her apartment complex. He declined. He then brandished a .22-caliber gun and during the course of the time in which he was at Ms. Lamborn's apartment forced her to perform various sexual acts with him six different times.

The defendant finally released Ms. Lamborn and told her that she was free to go. She ran to a neighbor and called the police. She testified that during the time she was with him he appeared normal—perhaps a bit tired.

At 10:15 p. m. on August 11, 1977, in Cherokee County, Iowa, a Deputy County Sheriff found an apparently abandoned car. When he returned and found that the car had not been moved he ran a check on the in-transit registration in the rear window of the vehicle. This check revealed that the car was registered to Robert E. Williams of 2956 N. 40th Street, Lincoln, Nebraska. At 6:15 a. m. on August 12, the Deputy Sheriff again returned and found the car still there. An examination of the car revealed a .22-caliber pistol box, a box of .22 long rifle cartridges, and other items.

On August 12, 1977, shortly before 6:00 a. m. Mrs. Jack Montgomery of rural Larrabbee, Iowa found her car missing from the garage. As she returned to the house she found a checkbook lying in the driveway. The checkbook contained checks imprinted with the names of Robert and Marilee Williams. The Montgomery car was found

abandoned, at approximately 7:15 a. m. that same morning in Clay County, Iowa, which is adjacent to Cherokee County.

Mr. Elbert Bredvick testified that at approximately the same time, he was asked directions by a man whom he identified at trial as the defendant. The defendant said he wanted directions to the nearest town. Mr. Bredvick gave the defendant the requested directions. The defendant departed in conformity with the destination sought by his request. That path also led past the Wayne Rowe residence which was located about a half mile from the location where the conversation with Mr. Bredvick occurred.

When Mr. Rowe came home later that morning, he found his wife upstairs in their bed fatally wounded. It was later determined that she had also been sexually assaulted. Closer examination of Mrs. Rowe revealed a gaping hole in her side from a shotgun blast. Another shotgun blast had ripped up her back. A third wound inflicted by a .22-caliber hand gun was found at her neck.

The .22-caliber bullet entangled in the fibers of the bedspread compared to those which caused the fatal deaths of Katherine Brooks and Patty McGarry. Negroid hairs were also found on Mrs. Rowe's hand and on the bedspread. Those hairs compared favorably in diameter, coloration, figment distribution, scale patterns, conditions and medullation to samples taken from the defendant, Robert E. Williams.

On Friday, August 13, 1977, Mr. Walter Behun was in his backyard in Fridley, Minnesota, a suburb of St. Paul. Defendant approached Mr. Behun and admonished him that he would suffer no harm as long as he did not

cause any trouble. The defendant ordered Mr. Behun to go get his car.

Mr. Behun offered his car keys to the defendant. The defendant declined and ordered Mr. Behun to take him to St. Paul. When defendant noticed a freightyard, he told Mr. Behun that that was where he wanted to go. The defendant then ordered Mr. Behun to go with him over by the train area. The defendant tied Mr. Behun up using his own belt and the defendant's sweatshirt. He also gagged Mr. Behun with his own handkerchief and left him in the caboose. At trial, Mr. Behun testified that the defendant appeared "a little excited about the initial approach and then after that, he—it was quite—quite matter of fact." When asked whether the defendant's speech was slurred, walk was staggered, or coordination unusual, Mr. Behun answered: "Not at all. He seemed to be perfectly normal."

At approximately 4 o'clock that same afternoon Katie Billings was purchasing some beer in a liquor store. She testified that upon returning to her car a black man came up behind her and said to get into the car or that he would shoot her. Before she had time to do anything he shot her once in the arm. He then told her to get into the car and shot her again—behind the ear. Defendant then took Ms. Billings out into the country in her car, and raped her. He then tied her up with straps off her purse and left her. At trial, Ms. Billings identified Robert Williams as the perpetrator of the crime against her. She further testified that the defendant conducted himself in a "very matter of fact manner"; that there was nothing unusual in the way in which he walked; that she observed him to have no difficulty in controlling the movement of the weapon with his hands or with hand munipulations in zipping down his

trousers. In her opinion, Robert Williams appeared wholly normal.

In the predawn hours of August 18, 1977, a breakman for the Burlington Northern Railroad in Lincoln, Nebraska, encountered a man whom he recognized from police flyers as Robert Williams. He immediately went back to his station and notified one of his superiors. His superior called the Lincoln Police Department. Lincoln Police Officers Pitts, Solono, Wagner and Olson responded to the call.

Two of the officers discovered the defendant, and placed him under arrest at that location. After being taken to the Lincoln Police Station and being given his Miranda warnings, the defendant gave a full taped statement to the Lincoln Police.

In his statement the defendant, inter alia, admitted killing Katherine Brooks and Patty McGarry. He maintained at the time he gave statement and consistently throughout the trial that he did not rape Katherine Brooks. He stated that he did order Katherine to take off her clothes, however he did so to prevent her from calling for help.

The defendant's recollection of the sequence of events surrounding the shootings differed from the physical evidence. He adamently maintained that he did not touch the shades of Patty McGarry's apartment windows. Yet when the police arrived at Patty McGarry's apartment and discovered her body all the shades in the apartment were pulled. He did not remember how many shots he fired in the McGarry apartment but stated he did not believe he emptied his gun. He stated that he did not leave any shells in Lincoln.

After a number of pretrial motions and hearings, the defendant was tried before a jury. At the close of the trial the jury deliberated for over six and one-half hours before returning a verdict of guilty on two counts of murder in the first degree for the deaths of Patty McGarry and Katherine Brooks and one count of first degree sexual assault on Katherine Brooks.

Pursuant to section 29-2520, R. R. S. 1943 a panel of three district court judges was convened for the purpose of sentencing the defendant. The panel entered an order sentencing the defendant to death by electrocution, said sentences to run consecutively on count I and count II; and for count III, a term of not less than eight and one-third nor more than 25 years in the Nebraska Penal and Correctional Complex. Finally, the defendant was given credit for 316 days presentence jail time, and ordered to pay the costs of the action.

After his conviction and sentence the defendant petitioned for a new trial, which was denied. He then appealed as of right to the Nebraska Supreme Court. The Nebraska Supreme Court upheld his conviction and sentence. Finally, the defendant petitioned the Nebraska Supreme Court for a rehearing, that, too, was denied.

REASON TO DENY CERTIORARI

I.

The decisions of the trial court and Nebraska Supreme Court regarding police reports requested by the defense, did not violate any right to which the defendant was entitled.

The petitioner claims that he was "denied a fair trial" because of the "prosecution's willful and prejudicial with-

holding of relevant and favorable evidence. . . ." Initially it should be noted that the entirety of the evidence referred to here consists of 18 police reports.

In making this argument the petitioner totally misconstrues the trial court's order regarding discovery and also the United States' Supreme Court decisions regarding materiality. Furthermore, the petitioner continually attempts to fuse two legal concepts which are separate and should be kept distinct. The first concept is that surrounding the court order, the second, is that surrounding the constitutional doctrine of materiality.

The order for discovery from the trial court did *not* compel the state to turn over the police reports in question. The petitioner indicates that all his motions regarding evidence were sustained, *it is interesting to note that he fails to include orders to that effect from the trial court.* He does not, for he cannot. In fact, the only order that was issued was the one corresponding to the defendant's motion to discover and inspect (defendant's appendix F). That this is true is not only supported by the record, but also from the express finding of the Nebraska Supreme Court. *State v. Williams,* 205 Neb. 56, 70-71, 287 N. W. 2d 18, 26-27 (1979).

After making this finding the Nebraska Supreme Court disposed of the issue of the police reports by saying:

> "Defendant complains of violations which involve documents under paragraph 5 of the order and center around 18 police investigative reports which contained, in many instances, summaries of statements of witnesses as well as inferences or conclusions of officers as to the validity and veracity of portions of all the witnesses' statements. The defendant asserts that if the testimony of a witness at trial differed in any respect from the statement as reported in the police report, the State should have delivered the police re-

port to the defendant prior to trial. *Such a conclusion is wholly unwarranted.* At the hearing on defendant's motion for new trial, the alleged violation of the discovery order *was raised and evidence introduced,* and the trial court, on this issue, specifically found:

> 'Nothing in the exhibits appears to be materially at odds with the testimony given at the trial. Those who testified were subjected to cross-examination at length by defendant's counsel or were called as witnesses for the defendant. No showing is made that information in the police reports could have been used to impeach any witness.' . . ." *Id.* at 71.

Thus, this question was raised, litigated, and settled. The prosecution did not violate any order of the trial court by not turning over the police reports in question.

The preceding quote from the Nebraska Supreme Court also settles the second question; that of materiality. To the extent that the court found that these reports could not have been used to impeach any witness, and more importantly, to the extent that the defense was able to cross-examine *all* of those involved, it is impossible to see how the defense can still claim that having these reports was crucial to their defense.

Beyond this, the Nebraska Supreme Court expressly found that the decisions regarding these police reports were well within the doctrine of materiality established in the United States Supreme Court cases of *Moore v. Illinois,* 408 U. S. 786; and, *United States v. Agurs,* 427 U. S. 97.

Clearly, as a matter of *fact* it was found that these reports were not necessary to petitioner's defense; as a matter of law, it was found that this fully complied with all of the defendant's rights.

II.

The decisions made by the trial court and the Nebraska Supreme Court regarding admission of evidence did not infringe on any rights of the defendant.

In his second argument the petitioner claims that he was denied a fair trial because the prosecutor violated his duty to act in such a manner as to insure a fair hearing. Even on the surface, it is clear that this argument has no merit.

Above and beyond the general considerations involved in questions of evidence, it is blatently obvious that this claim is defective. Whatever may be a prosecutor's duty in this regard, it is inane to say he acted unfairly simply because he admitted evidence which the *trial court* had examined and expressly found to be admissible. The petitioner himself admits that he made his objections at a hearing on March 2, 1978 and that he was overruled (petition for certiorari, pages 27-28).

Furthermore, the issue was absolutely settled on review by the Nebraska Supreme Court. That court found:

> ". . . only three of the challenged seven photographs might reasonably be said to be gruesome." 205 Neb. at 67.
>
> "The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court, which must determine their relevancy and weigh their appropriate value against their possibly prejudicial effect. . . . In a homicide case, photographs of the victim, upon proper foundation, may be received into evidence for the purposes of identification, to show the condition of the body, the nature and extent of the wounds or injuries, *and to establish malice or intent*. . . . The photographs submitted here were relevant and of direct probative value in establishing

the various elements of the crimes charged. The court *did not abuse its discretion* in admitting the photographs into evidence." 205 Neb. 67-68. (Emphasis added.)

This holding is wholly in line with the Nebraska Supreme Court's prior decisions. That holding is also in line with the United States Supreme Court ruling in *Lisenba v. California,* 314 U. S. 219 (1941).

Lisenba involved a different type of evidence, but the argument made there was *exactly like* the one that the petitioner is advancing herein. In response to that particular type of argument, this Honorable Court admonished:

> "The petitioner says that the sole purpose of the production of snakes was to *prejudice the jury against him* . . . we do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of the law. The fact that evidence admitted as relevant by a state court is shocking to the sensibilities of those in the court room *cannot* for that reason alone render its reception a violation of due process." *Id.* at 228-229. (Emphasis added.)

The defendant suggests that these pictures were not necessary because: "In his statement the defendent in essence admitted to most of the elements of the crimes charged." (Petition for Certiorari, page 30).

Putting aside the petitioner's questionable opinion as to what constitutes "most of the elements", it is critical to consider two things: 1. those elements that the defendant *didn't* admit to, and, 2. the purposes for which the pictures were introduced.

To illustrate, in his statement the defendant admitted to killing Patty McGarry and Katherine Brooks. He spe-

cifically *denied* sexually assaulting Katherine Brooks. *He constant'y maintained that he had not deliberated or premeditated the crimes.* With regard to his statement then, the defendant's version of the story would have led to the conclusion that he had not committed a sexual assault in the first degree against Katherine Brooks and moreover, that although he admitted that he killed Katherine Brooks and Patty McGarry, he did so without deliberation and premeditation and/or as a result of a sudden quarrel, thereby making him guilty of only second degree murder or manslaughter. The state had charged Robert Williams with two counts of murder in the first degree and sexual assault. In that connection, it has been the law of Nebraska for at least a century, that in addition to being unlawful and malicious, to make the act of killing murder in the first degree, it is necessary to establish that it was done with deliberation and premeditation.

Hence, while it is true that there was no real question that the defendant perpetrated the murders, his state of mind and whether he possessed the capacity to perform the requisite intent was sharply at issue. It was the precise issue upon which the defendant's guilt or innocence of first degree murder turned. The probative value of these pictures cannot be doubted. They were necessary for the State to prove one of the critical elements of its charge against the defendant; an element that was contested throughout the trial and appeal process.

The last issue with regard to these pictures is found on page 30 of the petitioner's petition for certiorari. The petitioner says:

> "It is admitted that all crime scene photographs stemming from a homicide case are gruesome and inflammatory . . . The large number of photographs introduced and used by the State (in this case) was clearly excessive."

The fact is, that the vast majority of the pictures involved in this case can in *no way* be considered gruesome. They are, for the most part, pictures of inanimate objects such as the beer bottle and a large number of photographs of various parts of the house. This is simply another instance of the petitioner grabbing at straws and taking focus away from the actual issues involved in this case.

The petitioner further complains because the prosecution admitted evidence of certain "other crimes" which he had committed. Again, it is hard to see how this reflects on the *prosecution's* conduct at the trial (which is the petitioner's claim here). The petitioner made his objections to this evidence at hearings before the trial court, and the trial court expressly overruled them. This decision by the trial court was subsequently upheld by the Nebraska Supreme Court.

In attacking this evidence, the petitioner again uses his argument that it was not needed due to the defendant's confession. As has been noted, the defendant did *not* admit to *all* of the elements that the state needed to prove their case. Given that, and given the undisputed fact that the defendant left *no living witnesses* at the McGarry apartment, it is impossible to understand how the petitioner can make this claim.

The evidence of these other crimes was needed for the state case, and the trial court's decision to allow the admission of this evidence was in all respects proper.

As the Nebraska Supreme Court said in ruling on this same issue:

> "As an exception to that rule, this court has repeatedly held that evidence of other crimes similar to that charged is relevant and admissible when it tends to prove a particular criminal intent which is neces-

sary to constitute the crime charged." 205 Neb. at 64.

The court further stated:

> "The evidence of other crimes was relevant to prove motive, opportunity, and intent, and that relevance is greatly strengthened by the fact that all other crimes occurred within a period of less than 72 hours after the crimes with which the defendant was charged. Not only was the evidence relevant on the issue of motive and intent, but it established plan, preparation, and a method of operation substantially similar, including the use of the same gun in similar wounds in the neck and near the ear of the victims.
>
> "There was no abuse of discretion on the part of the trial court in admitting the evidence of other crimes here. The prejudicial effect on the defendant of the admission of the evidence of other crimes is clearly outweighed by the relevance of that evidence to prove the crimes with which the defendant was charged." 205 Neb. at 66.

This decision regarding the evidence of other crimes was in complete harmony with past decisions of the Nebraska Supreme Court. As that Court said in *State v. Casados,* 201 Neb. 726 (1978):

> "The very fact of the continuing existence of this state of mind was most relevant to the proof of the intent charged. The scope of testimony relating to other acts and offenses by the defendant is a matter to be determined in the discretion of the trial court. The exercise of such discretion by the trial court was proper within the scope of section 27-404 (2), R. R. S. 1943." 201 Neb. at 729.

Please note that on page 36 of his petition for certiorari the petitioner asks the court to see section 27-404(2), R. R. S. 1943. He follows this request with a quote which ostensibly interprets that law. It is interesting to

note that this Court is never told where that quote can be found. Again, based on *Casados,* 201 Neb. 725, and also based on reading of the law as it is written, it is clear that the decision of the trial court and the subsequent review by the Nebraska Supreme Court at all times were in conformity with the law. Section 27-404(2), R. R. S. 1943, was a primary focus during the review by the Nebraska Supreme Court. As has been noted, the trial court's decision was upheld in light of that very statute.

It is critical to further note that in his petition for certiorari the petitioner *does not attack the validity of this law.* Clearly, the issue was decided and rests on adequate independent state ground. The petitioner was allowed to make his objections before the case went to trial, he again raised them during the trial process, finally he had this issue reviewed by the Nebraska Supreme Court. The petitioner has received all process to which he is due on this issue and the decisions of both the trial court and Nebraska Supreme Court clearly were correct both in fact and in law.

III.

The petitioner's third complaint centers around the trial court's decision not to give three requested jury instructions. The first of these instructions concerns the effects of intoxication as it relates to the mens rea element of the crime of murder in the first degree. The second two instructions concern the "effects" of a decision of "not guilty by reason of insanity."

Before going to the inaccuracies of the petitioner's charge in this regard, there is a more fundamental consideration. The petitioner here has failed to raise any kind of federal question. Jury instructions may of course

be challenged on review. However to justify this, one must show a clear constitutional violation. As this high court said in *Splawn v. California,* 431 U. S. 595 (1977):

> "... In federal courts ... our authority to review jury instructions is a good deal broader than is our power to upset state court convictions by reasons of instructions given during the course of a trial. (Citations omitted.) We can exercise the latter authority only if the instruction rendered the subsequent conviction violative of the United States Constitution." *Id.* at 599.

It is clear that the petitioner, to make his argument, must show a federal constitutional violation. The petitioner attempts to raise his complaint to a constitutional level by saying: "The ultimate result of the court's action in this regard was to deny the defendant due process in law and equal protection of the law in that *he was not allowed to present his theory of the case to the jury ...*" (Petition for Certiorari, page 37).

This constitutional theory of the petitioner is specious. There is no doubt that the defendant was able to present his case to the jury. The entire basis of his defense was that the defendant was "insane" due to "intoxication." The jury heard this repeatedly throughout the trial.

Putting aside the intoxication instruction (which it will be shown was adequately covered by other instructions which were given) the two relating to the insanity defense had absolutely no bearing on the defense's ability to present its case to the jury.

The jury's imperative was to determine if the defendant was: guilty, innocent, or not guilty by reason of insanity. They *did* hear the defense's argument support-

ing "not guilty by reason of insanity," they *were* told what elements were needed to establish this, they *were* presented with all relevant evidence to judge these elements. The fact that the jury may not have been told how tightly the doors of the mental institution are locked at night could not, and did not, have any effect on the ability of the defense to present his theory of insanity to them.

Even if the petitioner could present a substantial federal question with regard to these jury instructions, his challenge here is totally without substance. The instruction on intoxication was more than adequately covered with other instructions which the jury did receive. Jury Instruction No. 9 (Appendix A) totally informed the jury about the effects of insanity. Jury Instruction No. 10 (Appendix B) *specifically informed the jury of the legal effect that they should give if they find that the defendant was intoxicated due to the use of alcohol or drugs.*

Clearly the jury received all necessary instruction concerning both insanity and intoxication. Given that, it is impossible to see how the defendant can claim that because the specific instructions he wanted were not given, he was thereby denied due process of law.

The petitioner suggests that the issue of jury instructions describing the effect of the finding of not guilty by insanity (The Lyle Doctrine) was one of "first impression in Nebraska." This was not entirely correct. In reviewing this same assignment of error the Nebraska Supreme Court said:

> "The defendant assigns as error the trial court's refusal to instruct the jury with regard to the conse-

> quences of acquittal by reason of insanity. The recent case of *State v. Reitenbaugh,* (204 Neb. 583, 284 N. W. 2d 19 (1979)) has determined the issue adversely to the defendant. In that case we held: It is not error to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity." 205 Neb. at 72.

Finally, the petitioner argues, that if all else fails, the United States Supreme Court should accept certiorari in this case to settle a split of the circuits on the "Lyle Doctrine."

The buzz words "split in the jurisdictions" always sound good to one seeking certiorari. Here, it sounds better than it is. The fact that the Nebraska Supreme Court decided this issue based on *state* considerations (that is, the *Reitenbaugh* case) is significant. More importantly, is the analysis of this High Court in *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202 (1937). In that case, the Supreme Court said:

> ". . . As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state court. . . ." *Id.* at 206.

Clearly, the *Ruhlin* analysis is applicable. Jury instructions, (like these) which don't reach a constitutional level, are solely for the determination of the state courts. Thus, a possible difference of opinion by the various courts does not justify certiorari.

IV.

Petitioner's fourth question is based on the constitutionality of the law in Nebraska regarding imposition and review of the death penalty. The petitioner's argu-

ments concerning this question (arguments IV, V, and VI) are replete with factual errors and misanalysis.

Two initial observations must be made. First, prior to his request for rehearing the defendant had not specifically challenged his death penalty sentence on Eighth Amendment grounds. Second, in his petition for certiorari, the defendant totally misrepresents the position of Chief Justice Krivosha in his dissent. The defendant takes isolated statements from the dissent, applies his own (that is, the defendant's own) rationale, and represents the latter as being that of the Chief Justice.

In fact, the Chief Justice's opinion was based on considerations *entirely different* than those espoused by the defense. Reasons which, it must be added, do *not* question the validity of the statutes, and do *not* give rise to any type of federal question.

To illustrate, the Chief Justice prefaces his dissent by stating:

> ". . . I wholeheartedly concur in all the conclusions reached by the majority, including its analysis and interpretation of how we are to apply LB 711, Laws 1978, except as to a single conclusion that the death penalty should be imposed in this case. My review of those cases included in the majority's addendum compels me to reach a contrary conclusion. . . ." 205 Neb. at 79.

Based on this quote, it seems clear that the Chief Justice was in full agreement with the majority that the law and standards *are proper*. He simply arrived at a different conclusion after performing the statutorily required analysis for review. Any time seven human beings are performing an analytical function not governed by euclidean geometry, it is no surprise that one of them will end up differing from the majority.

It is clear that this was the *only* point of disagreement between the majority and the dissent. As the Chief Justice stated:

> "All of that makes it seem clear to me that not only is this court required to examine aggravating and mitigating circumstances, but in addition to that we are supposed to in some manner place each first degree murder case one on top of the other to see whether or not they all conform . . . I do not by saying this suggest that the majority has ignored that requirement. They have reached a different conclusion by reason of making a significant distinction in the circumstances." 205 Neb. at 84.

Thus, the entirety of the Nebraska Supreme Court has found the laws which petitioner now questions to be valid. Further, they made an implicit finding that LB 711 should be retroactively applied. This extra level of review that was thus granted to the defendant, was in his favor. Clearly, the Nebraska court has the duty and the responsibility to interpret the laws of Nebraska and their decisions in this regard should not be disturbed. This is particularly true where those decisions result in: (1) giving a statute a constitutionally sound interpretation and (2) giving the statute an interpretation which is most in favor of the accused.

Most of the petitioner's claims with regard to the death sentence in this case disappear in light of the two preceding observations. Some of these claims, however will be given a more specific response. On page 42 of his petition for certiorari the defendant states:

> "Petitioner further contends that his sentence was, in part, a response to the strong and impassioned public opinion generated by the case in the relevatively homogenous and tight knit community of Lin-

coln, Nebraska . . . The extent of this publication can be easily verified by examining large number of exhibits that were introduced into evidence at the hearing for a change of venue."

Putting aside the contradiction between this claim and the petitioner's view that the *jury* should have been the one to decide his sentence; it is clear, that the venue issue was properly decided against the petitioner at the state level.

The Nebraska Supreme Court said:

"The trial court held a hearing on the motion for change of venue prior to trial, at which time the results of an opinion survey conducted by two professional poll researchers and other evidence as to the nature and extent of pretrial publicity were introduced . . .

". . .

"The defendant takes the position that extensive pretrial exposure of jurors to information and news accounts as to the crimes with which the defendant was charged is sufficient, standing alone, to deprive him of due process. That conclusion is unfounded. Murphy v. Florida, 412 U. S. 794 . . ." 205 Neb. at 68-69.

The Nebraska Supreme Court went on to say:

"In this state a motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. (Citation omitted.) While there was extensive pretrial publicity in the case now before us, we believe the record supports the action of the trial court in denying the motion for a change of venue and there was no abuse of discretion." 205 Neb. at 69.

Clearly the issue of venue was decided by the trial court which, in turn, had all the evidence before it. The

decision of the trial court was reviewed and upheld by the Nebraska Supreme Court. There was no prejudice based on the issue of venue. Also, the defendant in his petition for certiorari, fails to indicate any evidence which might lead one to believe that prejudice had existed.

The petitioner indicates that the use of a sentencing panel denied him a jury of his peers. This argument, it must be noted was not raised in any of the hearings below. Also, petitioner fails to provide *any rational basis* to justify his argument.

The defendant had a full trial and was found guilty by *a jury* of his peers. The penalty imposed *after* this jury judgment is statutory. It is ludicrous to claim that the use of a sentencing panel in this situation denies one of a right to trial by a jury.

The petitioner's next claim is that the laws of Nebraska unconstitutionally shift the burden of proof to the defense in situations involving the death penalty. In his petition for certiorari on page 50 the defendant claims:

> "In mandating that the state and the defense or his counsel shall be *permitted* to present argument for or against the sentence of death, the legislature has clearly directed that the responsibility for coming forward with evidence of mitigation rests with the defense or his counsel." (Emphasis added.)

That petitioner's interpretation of the law is wrong is self-evident. All that the law in this instance does, is to further insure accuracy in the application of the death penalty by allowing both sides to further present evidence if they so desire. It should also be noted that these laws do not act to restrict the defense in what evidence it may present as has been suggested by the petitioner. *Any*

evidence which tends to mitigate the culpability of the defendant in a way that is recognized by the law may certainly be introduced by the defendant.

All remaining points made by the petitioner in his attack on the death penalty are based on faulty premises. The first of these is that there is a lack of standards in the Nebraska law concerning the death penalty, and the second is that there are lack of mandates in these laws.

The aggravating and mitigating circumstances which the judging panel can and in fact must use in determining which sentence a person convicted of first degree murder will receive are set out within the statutes. These standards are very clear and provide a basis on which the judicial panel may make a decision that is in compliance with the Nebraska law and with the federal constitutional provisions set down by this honorable court.

Petitioner's specific complaint in this regard is that not enough weight was given to his mental state at the time of the crime. This, of course, is wrong. The statute specifically provides that mental state is to be one of the mitigating factors which *must* be considered. In truth, the Nebraska statutes mandate standards. These standards provide the maximum route of protection and accuracy in the application of the death penalty. The petitioner fails to indicate how these laws in any way act to his detriment. It is difficult to imagine any system which could be more in compliance with the law—or operate more fairly.

Petitioner is equally wrong with regard to his arguments which are premised on lack of mandate. Specifically

these arguments are applied to the laws which govern supreme court review in instances where the death penalty is imposed. As has been noted previously, the *application* of that law which was involved in the case below was one which represented a valid interpretation of the law by the Nebraska Supreme Court. That interpretation was joined in by the entirety of the court (as has been noted, Chief Justice Krivosha agreed with the court on this point).

The Nebraska Supreme Court is required by statute to consider all criminal homicide cases decided previous to the one under review. In order to give this law a constitutionally acceptable interpretation under state law, the Nebraska court determined that it would limit its consideration to cases involving the charge of first degree murder. That interpretation is valid, fair, and in all probabilities, the only one which would be constitutionally permissible. The decision rests on independent state grounds and in no way infringes on the federal constitution to the United States. The petitioner fails to make any rational argument which would support the view that comparing his sentence to those which existed in other first degree murder cases is a violation of any constitutional right he might have. This interpretation, in fact, provides for the maximum accuracy in a review by the United States Supreme Court.

The petitioner's attack on the Nebraska death penalty statutes and review of those statutes is unnecessarily complex because of its: misapplied facts, misanalyzed statutes, and false presumptions. Essentially, the answers pro-

vided for in this reply brief are an attempt to answer them all while at the same time clearing up the inaccuracies. In essence, the statutes must be found to be legal. In cases of first degree murder a sentencing panel is brought together after, and only after a jury determines that the defendant is guilty. This panel is required to consider certain circumstances both aggravating and mitigating before making their decision. Furthermore, they must justify their decision in light of these criteria. This not only provides clear and rational standards but also assures for maximum accuracy in the mandatory review of the sentence. On review the Supreme Court is required to take into account past penalties that have been imposed in cases of first degree murder. Again, not everyone may see the results of this balancing test exactly in the same light. However, it is designed to provide the maximum protection for one who faces a potential sentence of death. The standards and methods of analysis which the court is required to use are set out by statute and must be followed with precision. There can be no doubt that the laws about which the petitioner complains are absolutely legal and in full compliance with the Constitution of Nebraska as well as the Constitution of the United States. Thus, like Portia's brand of mercy, they are "twice blessed."

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CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitioner herein enjoyed a full and fair trial and appellate review below. There exists, therefore, no reason

for this Honorable Court to grant the petitioner's writ for certiorari to the Supreme Court of Nebraska.

Respectfully submitted,

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APPENDIX A

INSTRUCTION NO. 9

The defendant contends that he was insane or mentally deranged at the time he is alleged to have committed the offenses charged in the Information. Insanity is a defense recognized by law and the evidence relating thereto should be considered by you and weighed the same as any other evidence.

The burden is upon the State to establish the fact of defendant's sanity beyond a reasonable doubt.

If from all of the evidence you are convinced beyond a reasonable doubt that the defendant committed the act or acts charged and that at the time of the commission of the alleged crime he was of sufficient mental capacity:

1. To understand what he was doing and the nature and quality of his act;
2. To distinguish between right and wrong with respect to it; and
3. To know that such act was wrong and deserved punishment,

then the defendant would be legally responsible for his acts and you should return a verdict of "guilty," although you might find that at the time he was suffering from some degree of insanity or impairment of the mind.

If from the evidence or lack of evidence in this case a reasonable doubt is raised in your minds as to the defendant's mental capacity at the time of the commission of the alleged crime:

1. To understand what he was doing and the nature and quality of his act; or

2. To distinguish between right and wrong with respect to it; or
3. To know that such act was wrong and deserved punishment, it is your duty to find the defendant "not guilty by reason of insanity."

GIVEN

/s/ Herbert A. Ronin

Judge District Court

APPENDIX B

INSTRUCTION NO. 10

Ordinarily, voluntary drug or alcohol intoxication is no justification or excuse for crime; but excessive drug or alcohol intoxication by which a person is wholly deprived of reason may prevent deliberation, premeditation or having the intent charged.

If you find that the defendant was intoxicated with drugs or alcohol, that fact should be considered by you, together with all the facts and circumstances in evidence, for the purpose of determining whether or not you have a reasonable doubt that defendant was at the time in question capable of deliberation, premeditation or having the intent charged.

GIVEN

/s/ Herbert A. Ronin

Judge District Court